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In The

Supreme Court of the United States

October Term, 1988

DONALD KELSEY, DAVID KELSEY, and KATHY KELSEY,
Petitioners,

vs.

MUSKIN INCORPORATED, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT DOUGHBOY RECREATIONAL (JOINED IN BY CERTAIN OTHER RESPONDENTS)

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	*ii*
COUNTERSTATEMENT OF THE CASE	1
A. Facts relevant to the CPSA issues	1
B. Facts relevant to the causation issue	2
SUMMARY OF ARGUMENT	4
REASONS FOR DENYING THE WRIT	5
POINT I: The Federal Courts — Including All Four Courts Of Appeals That Have Decided The Issue — Are Well On Their Way To Resolving Earlier District Court Conflicts Over The Existence Of A Private Right Of Action; And, Since The Second Circuit Declined To Decide The Issue, Review By This Court Is Especially Unnecessary Here	5
POINT II: Donald Kelsey's Extreme Recklessness Was The Sole Legal Cause Of His Injuries Under Any Rational Standard Of Causation; Thus, Construction Of The "By Reason Of" Requirement In § 2072 Would Not Affect The Result On The Unusual Facts In This Case	8
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Comm., 569 F.2d 831, 840-841 (5th Cir. 1978) 12

Benitez-Allende v. Alcan Aluminio Do Brasil, 857 F.2d 26 (1st Cir. 1988) 5

Copley v. Heil-Quaker Corp., 818 F.2d 866 (6th Cir. 1987) (text in Westlaw, CTA Database)..... 6

Deslauriers v. Honda Motor Co., No. 88-407 (W.D. Pa. June 24, 1988) (available on LEXIS, Genfed Library)..... 6

Drake v. Honeywell, Inc., 797 F.2d 603 (8th Cir. 1986)5, 6, 7, 11

Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) .. 9

Kelsey v. Muskin, Inc., 848 F.2d 39 (2d Cir. 1988) ... 1, 4

Kukulka v. Holiday Cycle Sales, Inc., 680 F. Supp. 266 (E.D. Mich. 1988) 6

Mack v. Altman's Stage Lighting Co., 98 A.D.2d 468 (2d Dept. 1984)..... 10

Mason v. Bernzomatic Corp., No. 87-7380 (E.D. Pa. July 6, 1988) (available on Westlaw, DCT Database) . 6, 7

Sedima v. Imrex Co., 473 U.S. 479 (1985) 8, 9

Smith v. Stark, 67 N.Y.2d 693 (1986) 10

Sperber v. Boesky, 849 F.2d 60 (2d Cir. 1988) 9, 10

Zepik v. Ceeco Pool & Supply, Inc., 637 F. Supp. 444 (N.D. Ind. 1986) 6

Page

Zepik v. Ceeco Pool & Supply, Inc., 118 F.R.D. 455 (N.D. Ind. 1987), *aff'd sub nom., Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936 (7th Cir. 1988) 6, 10, 11

STATUTES AND REGULATIONS

Consumer Product Safety Act, 15 U.S.C.

§ 2051 1

§ 2064(b) 5

§ 2064(c) and (d) 11

§ 2072(a) 8

43 Fed. Reg. 34998 (Aug. 7, 1978) 1

OTHER AUTHORITIES

Holmes, The Common Law, pp. 93-96 10

Prosser & Keeton on Torts 264 (5th ed. 1984) 9

COUNTERSTATEMENT OF THE CASE

Petitioners' statement of the case omits many facts crucial to deciding whether this case is an appropriate one for review by this Court.[1] These additional facts follow.

A. *Facts relevant to the CPSA issues*

It is undisputed that the swimming pool involved in this case was sold to the Harts in 1969. J.A. 3, 92.[2]

The CPSA was enacted, and the CPSC came into existence, in 1972 — more than three years after the subject pool was sold. 15 U.S.C.A. § 2051 (eff. date 10/27/72).

Moreover, it was not until 1978 — some *nine* years after this pool was sold — that the CPSC promulgated its regulations interpreting the hazard reporting duty imposed directly by the statute. 43 Fed. Reg. 34998 (Aug. 7, 1978).

Because this pool was sold in 1969, the Second Circuit cautioned that, even if a private right of action exists for an alleged violation of the reporting rules, it is doubtful that these plaintiffs could state such a claim. 848 F.2d at 42.

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[1] Petitioners will be referred to hereinafter as plaintiffs or by their names; respondents, as defendants. This brief in oppostion is being filed on behalf of the respondent Doughboy Recreational. Pursuant Rule 28.1 of this Court's Rules, Doughboy is an unincorporated division of Hoffinger Industries, Inc., a Delaware corporation. Several other respondents are joining in this brief to avoid repetition. Counsel for those respondents are listed at the end of this brief and will be filing separate appearances and statements under Rule 28.1

[2] Citations "J.A." and "Supp. J.A." refer to the joint appendix and supplemental joint appendix filed in the Second Circuit. A copy of each is being filed with the Clerk of this Court for convenient reference, if needed.

Further, several defendants are mentioned in the complaint only in plaintiffs' joint or "enterprise liability" claims under *state* law. J.A. 36-44. These defendants are not alleged to have manufactured the pool involved in this case. And they are not alleged to be liable under the CPSA claims.

B. ***Facts relevant to the causation issue***

Donald Kelsey admits that he injured himself by diving head-first from the top railing of a deck, over the pool's own fence and deck, and into a four foot, above ground swimming pool. J.A. 234-236. He had been swimming in the pool with the homeowner's son, Richard, on many occasions before the day of the accident. J.A. 93-94. On that day, both were in the pool for about fifteen minutes before plaintiff's dive. *Id.*

These basic facts about the dive itself are admitted by plaintiffs. They admit as well that Donald Kelsey was 21 years old at the time of the accident and a high school graduate, who has since completed his first year of college. Supp. J.A. 528-529 (plaintiffs' answers to Muskin, Inc. interrogatories).

Prior to his dive, Donald Kelsey drank at least "four to five" beers. *Id.* at 530. His blood alchohol content was later found to be .20%. J.A. 203.

A number of other facts are established by eyewitness affidavits and the photographs of the scene — and are not disputed by plaintiffs. A witness who dated plaintiff for a couple of years said she saw him on swimming outings diving from a bridge into the Oswego River. She described plaintiff as "a good diver and a good swimmer." J.A. 84-85, 88.

As noted above, Richard Hart also had been swimming with plaintiff on many occasions. Hart said he "knew [plaintiff] knew how to swim . . . ." J.A. 94.

Plaintiff has not denied that he was a good swimmer and diver. All he said on the subject of his experience with swimming and diving is that he had no "formal training in swimming or diving." J.A. 234.

But the extreme recklessness of Donald Kelsey's conduct cannot be fully appreciated without a clear picture of the physical layout of the house-deck and pool, as shown by Hart's description and the photographs. Hart said the house-deck is about five feet from the pool and the pool's own fence and deck extend about two feet more (1 1/2 ft. deck, plus the slanted fence), placing the house-deck about seven feet away from the water horizontally. Vertically, it is seven and a half feet above the pool and the railing extends upward another two and a half feet, for total vertical drop of about ten feet. J.A. 92.

The photographs of the deck and pool confirm Hart's description. Supp. J.A. 548-550 (Doughboy Exhs. A-C; color prints of the photographs are included in the supplemental joint appendix). The homeowner attested that they "fairly and accurately show the relative positions of the deck attached to the house and the swimming pool below and to the rear of the deck" on the day of the accident. Supp. J.A. 547.

Based on these facts, the Second Circuit concluded:

> [I]t cannot be said that the industry defendants' failure to report to the CPSC . . . caused Kelsey's accident. Kelsey had just been in the pool; he plainly knew it was only four feet deep. The danger of a head-first dive into such a pool from the deck of a house some eight feet higher should have been obvious to a person of his age and diving experience. A report that it was dangerous to perform such a dive would thus have disclosed only what Kelsey already knew or should have known . . . [T]he failure to report thus cannot be viewed as a

cause of Kelsey's injuries.

848 F.2d at 43.

SUMMARY OF ARGUMENT

There is no conflict among the circuits over whether a private right of action exists for violations of the CPSC's hazard reporting rules. All four courts of appeals that have decided the issue have held, with no dissents, that no such right of action is intended. Moreover, since the pool in this case was sold in 1969 — nine years before the reporting rules were issued — such a right of action would not apply in this case, in any event.

As to the claim that this court should adopt a uniform federal standard of causation for claims under the CPSA, the petition fails to indicate what the standard should be, or how it would differ from the one used by the Second Circuit in this case. Once again, the unusual facts of this case — the pool being sold before the CPSC existed and the extremely reckless dive by Donald Kelsey — make it clear that, under any rational causation requirement, Kelsey's own conduct is the sole cause of his injury.

Since Plaintiffs present only academic questions having no effect on the parties to this case, the petition should be denied.

REASONS FOR DENYING THE WRIT

POINT I: The Federal Courts — Including All Four Courts Of Appeals That Have Decided The Issue — Are Well On Their Way To Resolving Earlier District Court Conflicts Over The Existence Of A Private Right Of Action; And, Since The Second Circuit Declined To Decide The Issue, Review By This Court Is Especially Unnecessary In This Case

The petition offers the semblance of a conflict among the circuits by labelling district court decisions with the circuit in which the district court sits. Pet. 21-24. But no true conflict exists among the courts of appeals.

Four courts of appeals have decided the issue whether a private right of action exists for failure to report a product hazard. All four have held that Congress did not intend to create a private right of action for such conduct. The first court of appeals to address the issue was the Eighth Circuit in *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986).

In *Drake* the court examined the language of the private remedy provision, the legislative history, the remedial structure of the CPSA as a whole, and a variety of policy considerations as well, in determining that Congress did not intend a private remedy for violation of the CPSA's rules interpreting § 2064(b). 797 F.2d at 606-610.

Since *Drake*, three other courts of appeals have agreed that no private right of action exists for violation of the reporting requirement. In *Benitez-Allende v. Alcan Aluminio Do Brasil*, 857 F.2d 26 (1st Cir. 1988), the court briefly summarized the reasoning in *Drake* and concluded: "We see no need to repeat here the entire Eighth Circuit analysis. We agree with its result for the reasons it has set forth." 857 F.2d at 35.

Similarly, the court in *Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936 (7th Cir. 1988), expressly agreed "with the result in *Drake* and with much of its reasoning." *Id.* at 941. *Zepik* also held that Congress could not have intended a private right of action because the causal link between a defendant's failure to report and a plaintiff's injury would be "too attenuated and speculative to satisfy generally applicable standards of causation in fact or proximate cause." *Id.* at 942. *See also Copley v. Heil-Quaker Corp.*, 818 F.2d 866 (6th Cir. 1987) (text in Westlaw, CTA Database; holding issue of private right of action "controlled by the reasoning stated in *Drake*").

Each of these court of appeals cases has been decided unanimously.

As the petition concedes, the district courts facing the issue since *Drake* have, with (perhaps) one exception, agreed that no private right of action exists. *Deslauriers v. Honda Motor Co.*, No. 88-407 (W.D. Pa. June 24, 1988) (available on LEXIS, Genfed Library); *Kukulka v. Holiday Cycle Sales, Inc.*, 680 F. Supp. 266 (E.D. Mich. 1988); *Zepik v. Ceeco Pool & Supply, Inc.*, 118 F.R.D. 455 (N.D. Ind. 1987), *aff'd sub nom., Zepik v. Tidewater Midwest, Inc., supra.*

Indeed, the district court in *Zepik* had earlier upheld the CPSA claim in that case, relying on pre-*Drake* district court cases. *Zepik v. Ceeco Pool & Supply, Inc.*, 637 F. Supp. 444, 451 (N.D. Ind. 1986). When the issue was raised again, however, the district court in *Zepik* found "the *Drake* opinion to be better reasoned and more persuasive than" district court decisions pre-dating *Drake. Zepik v. Ceeco Pool & Supply, Inc., supra,* 118 F.R.D. at 458-459.

The lone exception since *Drake* is a tentative ruling in *Mason v. Bernzomatic Corp.*, No. 87-7380 (E.D. Pa. July 6, 1988) (avail-

able on Westlaw, DCT Database). The court there said only that it was "inclined" to hold a private right of action exists for violation of the reporting requirements. But the court then expressly reserved decision on the issue until a later stage in the action.

This tentative ruling in *Mason* hardly betokens a "growing number of inconsistent and conflicting decisions" in the years since *Drake,* as claimed by plaintiffs. Pet. 26.

To the contrary, the decisions since *Drake* show that the lower federal courts are resolving the early district court conflicts and achieving precisely the uniformity plaintiffs claim to be seeking. There is no need for this court to expend its scarce time and resources on this issue.

This is particularly so in this case, where the Second Circuit declined to decide the question as unecessary. The court pointed out that peculiar factual problems muddy the issue here. The pool in this case was sold in 1969. Congress did not enact the CPSA until 1972. And the rule supposedly violated by the defendants was not issued by the CPSC until 1978 — some nine years after the pool was sold.

Furthermore, several of the defendants are not even alleged to have manufactured this pool. As the Second Circuit noted, even if a private right of action existed, it would not help the plaintiffs in this case. How could the defendants have violated a reporting rule as to a pool which was sold nine years before the rule was issued — and a pool they did not make, at that?

In short, even if this Court at some point may resolve the private right of action issue, this is not the case in which to do so. A decision of that issue here would have no effect on the outcome between these parties. What plaintiffs seek, in effect, is an advisory opinion on whether *Drake* and the cases that follow it are correctly decided.

Accordingly, the petition should be denied.

POINT II: Donald Kelsey's Extreme Recklessness Was The Sole Legal Cause Of His Injuries Under Any Rational Standard Of Causation; Thus, Construction Of The "By Reason Of" Requirement In § 2072 Would Not Affect The Result On The Unusual Facts In This Case

The petition argues at length that this Court should articulate a uniform federal law of causation for suits under the CPSA. But nowhere does the petition articulate what the uniform federal standard should be. Nor is there any hint of how any such rule would differ from the familiar common law proximate cause standard.

Plaintiffs appear to recognize that the "by reason of" language in § 2072(a) requires some level of causation. The thrust of their argument is that, whatever the causation element of their CPSA claim may be, it must be different from the common law concept of proximate cause, apparently because they believe that would allow them to recover in this case.

But plaintiffs have offered no persuasive reason why the causation element of a CPSA claim should be any different from the traditional proximate cause element. Interestingly, they cite this Court's treatment of the "by reason of" element of a RICO claim in *Sedima v. Imrex Co.*, 473 U.S. 479 (1985), as supporting a lesser standard of causation. The focus of the *Sedima* decision, of course, was on the kinds or categories of injury for which damages may be recovered under RICO.

When the Court did mention causation, it simply held that "the compensable injury necessarily is the harm *caused* by predicate acts sufficiently related to constitute a pattern . . . ." 473 U.S. at 497 (emphasis added); *see also id.* at n. 15 (criticizing view that "harm *proximately caused* by the forbidden conduct is not compensable"; emphasis added).

In the companion case to *Sedima*, the Seventh Circuit did focus on the application of the "by reason of" language in RICO. In *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985), the court of appeals held that a defendant in a civil RICO action may be found liable for treble damages only to those injured " 'by reason of' a violation of [RICO]." 747 F.2d at 398.

The court in *Haroco* specifically held that "[T]his 'by reason of' language . . . simply imposes a *proximate cause* requirement on plaintiffs." *Id.* (emphasis added).

The Second Circuit has reached the same result under RICO. In *Sperber v. Boesky*, 849 F.2d 60 (2d Cir. 1988), the court began its analysis of the "by reason of" language with a reminder of the purposes for the proximate cause requirement in tort law:

> As a leading treatise explains, ". . . the consequences of an act go forward to eternity," and extending liability as far as factual causation therefore "would result in infinite liability for all wrongful acts . . . . *Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.*"

849 F.2d at 63 (quoting Prosser & Keeton on Torts 264 (5th ed. 1984); emphasis added). The court in *Sperber* went on to hold

that, under RICO, "[i]t is clear that [compensable] injuries must be proximately caused." 849 F.2d at 64.[3]

Returning to the CPSA, the Second Circuit in this case appears to have read § 2072's "by reason of" language as it did in the RICO statute in *Sperber*: as imposing a proximate cause requirement. In other words, a plaintiff under the CPSA would be required to show that the alleged violation of a CPSC rule was a proximate cause of the plaintiff's injury. *Accord Zepik v. Tidewater Midwest, supra,* 856 F.2d at 942 ("the causal connection required [under the CPSA] should be roughly equivalent to the causal connection required to establish common law tort liability").

In any event, no matter what standard of causation is read into the "by reason of" language, the result under the unusual facts of this case would not change. The causation issue poses two different sets of problems in this case.

First, there are the inherent difficulties in showing that a failure to report the supposed hazard to the CPSC had any causal relationship to Donald Kelsey's conduct at all. The magnitude of

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[3] Since the petition attacks the Second Circuit for applying the New York rule on proximate cause in these swimming pool diving cases, it is worth noting that the New York courts have explained the purposes of proximate cause in the same terms as the quotation from *Sperber, supra.* For example, in *Mack v. Altman's Stage Lighting Co.*, 98 A.D.2d 468 (2d Dept. 1984) (Titone. J.), the court wrote:

> The concept of [proximate] cause operates as a matter of public policy to place reasonable limits on liability . . . . As Justice Hopkins noted . . . "an intolerable burden would be cast on human activity if every voluntary act was committed at one's peril" (. . . citing Holmes, The Common Law, pp. 93-96).

98 A.D.2d at 470 (citations omitted). *Mack* was cited with approval in *Smith v. Stark,* 67 N.Y.2d 693, 694 (1986), one of the leading cases in New York involving swimming pool diving accidents, where the court held that "the lack of depth warning devices was not the proximate cause of plaintiff's injuries . . . ."

these causation problems has been a primary factor in the decisions refusing to recognize a private right of action under the reporting rules. *See Zepik, supra,* 856 F.2d at 942-943; *Drake, supra,* 797 F.2d at 610.

To show causation in this case, for example, plaintiffs would need to prove that if the defendants had reported to the CPSC, the CPSC would have decided to hold a hearing. Then they would have to show that the CPSC would have found that the common above ground swimming pool constitutes "a substantial product hazard." 15 U.S.C. § 2064(c) and (d).

Next, plaintiffs would have to invite the court or jury to speculate as to what remedy, if any, the CPSC might have ordered. And, in the end, plaintiffs would have to prove that, assuming all of the above, whatever the CPSC decided to do would have been accomplished *before* the date of this accident and that it would have been *effective* to prevent Donald Kelsey from doing what he did.

As the Eighth Circuit pointed out, these difficulties involve more than just proof problems for plaintiffs. They implicate the very integrity of the judicial factfinding process. To make all these findings would inherently involve pure speculation at every step. As the court in *Drake* concluded, "We doubt that Congress intended to set such a tortuous process in motion." 797 F.2d at 610; *see also id.* n. 12.

Because of these difficulties the court in *Zepik, supra,* declined to decide whether a federal causation rule is needed. The court merely held that "[f]or our purposes, it is enough to observe that . . . no plausible federal standard could deviate so radically from established concepts of causation in tort . . . as to authorize suits . . . for reporting violations." 856 F.2d at 942.

The second set of problems arising from the causation issue relate to the peculiar facts of this case. Among the links in the causation chain noted above is the need to show what remedy, if any, the CPSC would have ordered in response to a report from the defendants. This element is particularly difficult in this case, because the swimming pool here was sold in 1969 — three years before the CPSC came into existence.

Plaintiffs would be faced with proving that the CPSC would have ordered some type of remedy with retroactive effect. For just this reason the court in *Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Comm.*, 569 F.2d 831, 840-841 (5th Cir. 1978), found that CPSC rules requiring warning signs for pool slides that would have applied only prospectively would not be effective.

The problems are exacerbated in this case by Donald Kelsey's almost unbelievably reckless conduct in diving from the deck railing into the pool. Given that conduct by an experienced swimmer and diver, the final link in the causation chain — that whatever remedy the CPSC might decide to order would be effective to prevent this plaintiff's injury — could never be shown.

As the court in the *Aqua Slide* case put it, such conduct "bespeaks the kind of foolhardiness for which [warning signs] would provide no cure." 569 F.2d at 841 (finding insufficient evidence to show that warning signs would be heeded by users).

That, of course, is exactly the basis for the holding by the Second Circuit in this case that neither the alleged failure to warn under the various state law theories, nor the alleged failure to report to the CPSC, were a proximate cause of Donald Kelsey's injury.

In light of the extreme recklessness involved here, adoption of a "federal" standard of causation could not affect the result in this case. Accordingly, the petition should be denied.

CONCLUSION

Even if a private right of action existed and even if a uniform federal standard of causation were adopted, Donald Kelsey's own reckless behavior was, and would remain, the sole cause of his injuries. Consequently, the petition for a writ of certiorari should be denied.

Dated: December 12, 1988

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